

**Office of Chief Counsel
Internal Revenue Service**

memorandum

CC:LM:CTM:LN:TL-N-1396-01
KCPeterson

date:

to: Janice Martin, LMSB 1751, Long Beach

from: KENNETH C. PETERSON
Attorney (LMSB)

subject: [REDACTED]
Consent to extend the statute of limitations

DISCLOSURE STATEMENT

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This advice is not binding on the I.R.S. and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUES

1. Whether a Form 872-P executed by [REDACTED] as the Tax Matters Partner ("TMP") of [REDACTED], prior to the expiration of the statute of limitations established by I.R.C. § 6229 would be valid to extend the statute of limitations for [REDACTED] for taxable year [REDACTED].
2. Whether a Form 872-P executed by [REDACTED] as the TMP of [REDACTED], prior to the expiration of the statute of limitations established by I.R.C. § 6229 would be valid to extend the statute of limitations for [REDACTED]

██████████, for taxable period ██████████, to ██████████.

3. Whether a Form 872-P executed by ██████████ as the TMP of ██████████, prior to the expiration of the statute of limitations established by I.R.C. § 6229 would be valid to extend the statute of limitations for ██████████, for taxable period ██████████, to ██████████?

FACTS

██████████ ("██████") is a limited liability company ("LLC") that was created by ██████████, ██████████, and ██████████, on ██████████. The agreement gives ██████████ the power to manage ██████████. On ██████████, ██████████ technically terminated pursuant to I.R.C. § 708(b) because one member sold more than ██████████% of its interest in the LLC. As a result, ██████████ filed two returns (both Forms 1065) for the ██████████ calendar year. One return was for the period ██████████, to ██████████, and was filed on or about ██████████. The second return was for the period ██████████, to ██████████, and was filed on or about ██████████. ██████████ designated ██████████ as the tax matters partner ("TMP") on both of the returns. ██████████ was a member of the LLC during the ██████████ taxable year and was a member of the LLC when both of the ██████████ returns were filed. ██████████ is a United States citizen. ██████████ has not filed a certification with the Service Center with which the partnership return was filed stating that a successor TMP has been selected or a statement stating that he resigns as TMP of ██████████. No member of ██████████ has filed a statement with the Service Center with which the partnership return was filed designating a new TMP for either of the two ██████████ taxable periods. ██████████ has not filed with the Service Center with which the partnership return was filed a statement stating that ██████████'s designation as TMP has been revoked. ██████████ is alive, has not been adjudicated incompetent, and the partnership items of ██████████ have not become non-partnership items. (See Exhibit A.)

██████████ ("██████") is a limited liability company ("LLC") that was created by ██████████ and ██████████ on ██████████. The agreement gives ██████████ the power to manage ██████████. ██████████ filed a Form 1065¹ for taxable year

██████████ filed a Form 1065 for its first taxable period (the taxable period ending ██████████) and all subsequent taxable periods.

████ on or about █████, and designated █████ as the TMP on the tax return. █████ was a member of the LLC during the █████ taxable year and was a member of the LLC when the █████ return was filed. █████ is a United States citizen. █████ has not filed a certification with the Service Center with which the partnership return was filed stating that a successor TMP has been selected or a statement stating that he resigns as TMP of █████. No member of █████ has filed a statement with the Service Center with which the partnership return was filed designating a new TMP for taxable year █████. █████ has not filed with the Service Center with which the partnership return was filed a statement stating that █████'s designation as TMP has been revoked. █████ is alive, has not been adjudicated incompetent, and the partnership items of █████ have not become non-partnership items. (See Exhibit A.)

During █████, █████ sold a note that was due from a corporation and recognized a loss on the sale of that note. The Service is considering whether to disallow that loss. During █████, █████ sold a portion of its interest in █████, which resulted in a capital loss. During █████, █████ also sold a portion of a note that was due from a corporation and recognized a loss on the sale of that note. The Service is considering whether to disallow these losses, as well.

DISCUSSION

In general, the Service must assess a tax attributable to a partnership² item within three years after the partnership files the return. I.R.C. § 6229. However, pursuant to I.R.C. § 6229(b), the TMP and the Service may agree in writing to extend the assessment period related to partnership items. The TMP and the Service must execute the written agreement before the expiration of the assessment period. Id.

Who is the TMP?

A person may be designated as the tax matters partner of a partnership for a taxable year only if that person (i) was a general partner in the partnership at some time during the taxable year for which the designation was made or (ii) was a general partner in the partnership as of the time the designation was made. Treas. Reg. § 301.6231(a)(7)-1.³ A member-manager of an LLC is treated as a general partner. Treas. Reg. § 301.6231(a)(7)-2. Member-manager means a member of an LLC who,

² The LLCs at issue are treated as partnerships for tax purposes. The "check the box" rules, effective January 1, 1997, determine the tax classification of LLCs. Generally, domestic LLCs are automatically treated as partnerships for tax purposes if they have two or more members. Treas. Reg. § 301.7701-3. However, if such an LLC was in existence prior to January 1, 1997, it will have the same classification that it claimed prior to that date unless it has elected another classification. Treas. Reg. § 301.7701-3(b)(3)(i).

Here, [REDACTED] has always had more than two members. [REDACTED] filed its first return in [REDACTED]. [REDACTED] has always filed its return on Form 1065, U.S. Partnership Return of Income. Thus, it is treated as a partnership for tax purposes.

Here, [REDACTED] has always had two or more members. [REDACTED] filed a Form 1065, U.S. Partnership Return of Income, for taxable period ended [REDACTED]. [REDACTED] has continued to file Form 1065 subsequent to [REDACTED] and has not made an election to be reclassified. Thus, it is treated as a partnership for tax purposes.

³ If any United States person would be eligible under Treas. Reg. § 1.6231(a)(7)-1 to be designated as the TMP for a tax year, no person who is not a United States person may be designated as the TMP of the partnership for such year without the Commissioner's consent.

alone or together with others, is vested with the continuing exclusive authority to make management decisions necessary to conduct the business for which the organization was formed. Id.

The TMP for a particular year may be designated on the partnership return for that year. Treas. Reg. § 301.6231(a)(7)-1. The TMP specified on the return remains the TMP for that year unless the Service receives notice that a new TMP has been selected as a successor, the TMP has resigned, the partners have selected a new TMP or the partnership has revoked the designation of the TMP. Id. In addition, a person remains the tax matters partner of a partnership for a taxable year only if the person is alive, has not been adjudicated incompetent, and the partnership items of the TMP have not become non-partnership items. Treas. Reg. § 301.6231(a)(7)-1(1).

Here, the [REDACTED] agreement gives [REDACTED] the power to manage [REDACTED]. [REDACTED] was a member of [REDACTED] from the creation of [REDACTED] on [REDACTED], and continuing throughout [REDACTED]. [REDACTED] was designated the TMP on both of the [REDACTED] returns filed for taxable year [REDACTED]. [REDACTED] is a United States citizen. The Service has not received notice that a successor to [REDACTED] has been selected, that [REDACTED] has resigned, that the members of [REDACTED] have selected a new TMP or that [REDACTED] has revoked the authority of [REDACTED]. [REDACTED] is alive, has not been adjudicated incompetent, and the partnership items of [REDACTED] have not become non-partnership items. Thus, [REDACTED] is the TMP that should sign the consent to extend the assessment period for [REDACTED].

Here, the [REDACTED] agreement gives [REDACTED] the power to manage [REDACTED]. [REDACTED] was a member of [REDACTED] during the [REDACTED] taxable year and was a member of [REDACTED] when the [REDACTED] return was filed. [REDACTED] was designated the TMP on the [REDACTED] return. [REDACTED] is a United States citizen. The Service has not received notice that a successor to [REDACTED] has been selected, that [REDACTED] has resigned, that the members of [REDACTED] have selected a new TMP or that [REDACTED] has revoked the authority of [REDACTED]. [REDACTED] is alive, has not been adjudicated incompetent, and the partnership items of [REDACTED] have not become non-partnership items. Thus, [REDACTED] is the TMP that should sign the consent to extend the assessment period for [REDACTED].

Are the adjustments at issue partnership items?

The term "partnership item" means any item required to be taken into account for the partnership's taxable year under any provision of subtitle A (which relates to Income Taxes) to the extent regulations prescribed by the Secretary provide that such

item is more appropriately determined at the partnership level than at the partner level. I.R.C. § 6231.⁴

Losses that a partnership incurs are partnership items. Treas. Reg. § 301.6231(a)(3)-1. Here, [REDACTED] incurred a capital loss when it sold a note. [REDACTED] incurred a capital loss when it sold a note and when it sold its interest in [REDACTED]. Thus, the losses at issue are partnership items.

Has the statute of limitations expired?

Here, the [REDACTED] return was filed on or about [REDACTED]; the [REDACTED] return for the period [REDACTED], to [REDACTED], was filed on or about [REDACTED]; and the [REDACTED] return for the period [REDACTED], to [REDACTED], was filed on or about [REDACTED]. As a result, the statute on these returns will expire three years later, in [REDACTED]. I.R.C. § 6229. Because the statute of limitations has not yet expired, the Service still has time to enter into an agreement with the LLCs to extend the assessment period.

⁴ Note that certain small partnerships are excluded from Subchapter 63C of the Internal Revenue Code which is titled Tax Treatment of Partnership Items (i.e., some partnerships do not have to follow the TEFRA rules discussed herein.) For partnership tax years ending after August 5, 1997, the small partnership exception applies only if the partnership has 10 or fewer partners each of whom is an individual (other than a nonresident alien), a C corporation, or an estate of a deceased partner. I.R.C. § 6231(a)(1)(B)(i). For partnership tax years ending on or before August 5, 1997, the small partnership exception applies to a partnership consisting of 10 or fewer partners each of whom is an individual (other than a nonresident alien) or an estate provided that each partner's distributive share of any partnership item is the same as his distributive share of every other partnership item. I.R.C. § 6231(a)(1)(B)(i), prior to amendment by P.L. 105-34.

Here, [REDACTED] was formed on [REDACTED], by [REDACTED] and [REDACTED], an S Corporation. Because [REDACTED] remained a member of [REDACTED] throughout the years at issue, [REDACTED] does not qualify for the small partnership exception.

Here, [REDACTED] was formed by [REDACTED], [REDACTED], and [REDACTED]. Because [REDACTED] remained a member of [REDACTED] throughout the years at issue, [REDACTED] does not qualify for the small partnership exception.

What Form should be used for the written agreement?

The appropriate Form to use when extending the statute of limitations for partnership items for a specific period of time is Form 872-P, Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership. IRM, Handbook 8113, subsection 275.4.

CONCLUSION

1. A Form 872-P executed by [REDACTED] as the TMP of [REDACTED], prior to the expiration of the statute of limitations established by I.R.C. § 6229 would be valid to extend the statute of limitations for [REDACTED] for taxable year [REDACTED].
2. A Form 872-P executed by [REDACTED] as the TMP of [REDACTED], prior to the expiration of the statute of limitations established by I.R.C. § 6229 would be valid to extend the statute of limitations for [REDACTED] for taxable period [REDACTED], to [REDACTED].
3. A Form 872-P executed by [REDACTED] as the TMP of [REDACTED], prior to the expiration of the statute of limitations established by I.R.C. § 6229 would be valid to extend the statute of limitations for [REDACTED] for taxable period [REDACTED], to [REDACTED].

OTHER RECOMMENDATIONS

When soliciting the consents to extend the period of limitations, the Service must satisfy the requirements of I.R.C. § 6501(c)(4)(B). Therefore, please ensure that the statute extensions are requested by the most recent revision of the appropriate Form Letter.

Also, please make sure you use the correct last known address on the Forms 872-P that you send to [REDACTED] and [REDACTED].

We have coordinated this advice with National Office under the NSAR pre-review procedures. If you have any questions, call attorney Ken Peterson at (949) 360-2690.

KENNETH C. PETERSON
Attorney (LMSB)

Attachments

Exhibit A, The TMP checksheets